Moscow Narodny Bank Ltd v Ngan Ching Wen

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO W–03–6 OF 1996
GOPAL SRI RAM, AHMAD FAIRUZ AND DENIS ONG JJCA
30 AUGUST 2001

Bankruptcy *— Petition — Dismissal of — Accord and satisfaction, whether proved — Whether petitioner prejudiced by finding of judge that there had been complete settlement — Whether bankruptcy petition was wrongly dismissed*

The respondent resisted the bankruptcy petition on the ground that there had been a complete accord and satisfaction of the debt on which the bankruptcy proceedings were based. The High Court dismissed the petition. The plaintiff appealed. It was submitted that: (i) the bankruptcy petition was wrongly dismissed by the judge because the respondent had not challenged the bankruptcy notice within the time limited by the Bankruptcy Act 1967; and (ii) the judge found for the respondent on the point of accord and satisfaction without sufficient investigation of the facts.

Held, dismissing the appeal:

(1) The appellant's complaint about the respondent's failure to comply with the relevant statutory provisions was without merit since the respondent had in fact filed and served a notice of intention to oppose the petition (see p 371C–D).

(2) The judge ought not have expressed any concluded view on the issue of accord and satisfaction in the absence of cogent evidence. However, in the state of evidence before him, the judge would have been perfectly entitled to dismiss the petition on the ground that it was an abuse of process. It was clear that the appellant had accepted payments from the respondent after commencing bankruptcy proceedings. The totality of the circumstances reasonably supported the inference that the appellant was using the bankruptcy court to extract payments from the respondent. That amounted to an abuse of the bankruptcy jurisdiction of the High Court (see p 371F–G).

(3) It was true that the appellant was prejudiced by the finding made by the judge that there had been a complete settlement. But that would easily be remedied by setting aside that part of the judgment and granting the parties liberty to institute appropriate proceedings to have that issue determined (see p 372A).

[**Bahasa Malaysia summary**

Responden telah menentang petisyen kebankrapan tersebut kerana hutang tersebut, yang mengasaskan prosiding kebankrapan tersebut, telahpun dijelaskan. Mahkamah Tinggi telah menolak petisyen

tersebut. Plaintif merayu bahawa: (i) petisyen kebankrapan tersebut telah ditolak secara salah oleh hakim kerana responden gagal menentang notis kebankrapan tersebut di dalam tempoh masa yang diberikan di bawah Akta Kebangkrapan 1967; dan (ii) hakim telah memutuskan untuk responden tanpa siasatan yang mencukupi di atas fakta-fakta kes.

Diputuskan, menolak rayuan tersebut:

(1) Aduan perayu bahawa responden tidak mematuhi peruntukan undang-undang adalah tidak bermerit memandangkan bahawa responden telahpun memfailkan dan menyampaikan notis menentang petisyen tersebut (lihat ms 371C–D).

(2) Hakim tidak sepatutnya memberi pendapat beliau mengenai isu penjelasan hutang tersebut memandangkan tiada keterangan yang kukuh. Walau bagaimanapun, dengan keterangan yang dikemukakan, hakim tersebut boleh membuang petisyen kerana ianya merupakan penyalahgunaan proses. Jelasnya, perayu telah menerima bayaran hutang daripada responden setelah memulakan prosiding kebankrapan. Dari keseluruhan keterangan, boleh dikatakan bahawa perayu menggunakan mahkamah kebankrapan untuk mendapatkan bayaran hutang daripada responden. Ini merupakan penyalahgunaan bidangkuasa kebankrapan Mahkamah Tinggi (lihat ms 371F–G).

(3) Perayu telah diprejudiskan oleh keputusan hakim bahawa hutang tersebut telah dijelaskan sepenuhnya. Akan tetapi, ia dapat dibetulkan dengan menolak bahagian tersebut daripada keputusan beliau dan membenarkan pihak-pihak kebebasan untuk memulakan prosiding-prosiding untuk menentukan isu tersebut (lihat ms 372A).

Notes

For cases on petition generally, see 1 *Mallal's Digest* (4th Ed, 1998 Reissue) paras 1857–1923.

Cases referred to

J Raju a/l Kerpaya v Commerce International Merchant Bankers Bhd [2000] 3 MLJ 177 (refd)

Jasa Keramat Sdn Bhd & Anor v Monatech (M) Sdn Bhd [1999] 4 MLJ 637 (refd)

Legislation referred to

Bankruptcy Act 1967

Appeal from: Bankruptcy No D4–29–3629 of 1992 (High Court, Kuala Lumpur)

P Pereira (*G Shankar* with him) (*Skrine & Co*) for the appellant.

RR Sethu (*YS Leong* with him) (*Low Hop Bing, Koh Kong & Associates*) for the respondent.

Gopal Sri Ram JCA (delivering judgment of the court): **.** This appeal raises a short point of bankruptcy law. It concerns the interpretation of certain provisions of the bankruptcy legislation. The point at issue has in fact been determined fairly recently by a judgment of this court, see *Ƒ Raju a/l Kerpaya v Commerce International Merchant Bankers Bhd* [2000] 3 MLJ 177. Further, the learned judge, in the judgment appealed against, has dealt with the issue in sufficient depth. I therefore find it unnecessary to say much here.

The appellant's principal complaint is that its bankruptcy petition was wrongly dismissed by the learned judge because the respondent had not challenged the bankruptcy notice within the time limited by the Bankruptcy Act 1967. However, as observed by the learned judge, the respondent had, in fact, filed and served a notice of intention to oppose the petition. The learned judge held this to be sufficient. I am in agreement with this finding. It is supported by the judgment of Rose CJ in *Re United Marine Supply Co* [1960] MLJ 305. The appellant's complaint about the respondent's failure to comply with the relevant statutory provisions is therefore without merit.

There remains one further matter. The sole ground on which the respondent resisted the petition was that there had been a complete accord and satisfaction of the debt on which the bankruptcy proceedings were based. The appellant complains that the learned judge found for the respondent on the point without sufficient investigation of the facts. I think that there is much force in this argument. There may or may not have been an accord and satisfaction as alleged by the respondent. It is an issue that called for resolution in other proceedings properly brought by the respondent. The judge ought not, in my view, have expressed any concluded view on this issue in the absence of cogent evidence.

However, in the state of the evidence before him, the learned judge would have been perfectly entitled to dismiss the petition on the ground that it was an abuse of process. The appellant's own evidence warranted this. It is clear that the appellant had accepted payments from the respondent after commencing bankruptcy proceedings. The totality of the circumstances reasonably supports the inference that the appellant was using the bankruptcy court to extract payments from the respondent. That, in my judgment, amounts to an abuse of the bankruptcy jurisdiction of the High Court. The bankruptcy jurisdiction of the High Court is invoked on the ground that a debtor has committed an act of bankruptcy. The object of the exercise is to take the debtor's financial affairs out of his hands and place them in the hands of the official assignee. It is certainly an abuse of process to use bankruptcy proceedings in the way of a judgment debtor summons to extract periodical payments from the debtor.

As I have said upon other occasions, the categories in which the court's process may be abused are not closed. See for example, *Ƒasa Keramat Sdn Bhd & Anor v Monatech (M) Sdn Bhd* [1999] 4 MLJ 637. The present instance is merely another illustration of the proposition.

In my judgment, the learned judge's decision is entirely correct and is supportable on the additional ground that I have adverted to a moment ago. It is true that the appellant is prejudiced by the finding made by the learned judge that there had been a complete settlement. But that is easily remedied by setting aside that part of the judgment and granting the parties liberty to institute appropriate proceedings to have that issue determined.

For these reasons the appeal was dismissed, with the variation to the judge's order to the extent indicated in the preceding paragraph of this judgment. In the particular circumstances of this case, we made no order as to costs and directed the deposit to be refunded to the appellant.

Appeal dismissed.

Reported by Jafisah Jaafar